

**IN THE COURT OF APPEAL OF ZAMBIA Appeal No 76/2018**  
**HOLDEN AT NDOLA**  
(Civic Jurisdiction)

**BETWEEN :**

ZCCM INVESTMENTS HOLDINGS PLC

**AND**

BRANDON KAYULA CHIKANKATIKA  
&THREE OTHERS



**RESPONDENT**

**CORAM : Chishimba, Lengalenga and Siavwapa, JJA**  
**On 21<sup>st</sup> November, 2018 and 5<sup>th</sup> December, 2018**

For the Appellant : Mr E. Chulu of Messrs Enias Chulu – Legal Practitioners

For the Respondent : Mr. Brandon K. Chikankatika – In Person

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## **J U D G M E N T**

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**CHISHIMBA, JA, delivered the Judgment of the Court.**

CASES REFERRED TO:

1. **Tembo Vs. Sichembe & Others SCZ Appeal No. 177 of 2014**
2. **Mwambazi Vs. RDS Investments Limited (1977) ZR 108**
3. **RDS Investments Limited Vs. Moon Jelly Ouseph Joseph SCZ Appeal No. 52 of 1998**

The appeal arises from a judgment on assessment delivered by the learned Deputy Registrar in favour of the Respondents.

The brief facts of the matter are that, the Respondents as complainants in the court below had sought the following reliefs; a declaration that the complainants were employed for the service period of 1<sup>st</sup> June 2000 to 31<sup>st</sup> October 2003, terminal benefits

thereof and an order for the payment of 82 accrued leave days for the period as well as interest up to date of payment.

The Appellant refuted the fact that the Respondents were employees and averred that, they were mere consultants who are not therefore entitled to the reliefs sought.

The learned Judge of the Industrial Relations Court found in favour of the complainants and that they were entitled to be paid terminal benefits as employees; gratuity of 3 months pay for each completed year of service as well as leave pay with interest at 20% per annum to date of payment.

The record shows that although the Appellant had lodged an appeal in the Supreme Court, the appeal was abandoned. The matter subsequently proceeded for assessment before the learned Deputy Registrar.

The learned Deputy Registrar proceeded, on the 13<sup>th</sup> of November 2015, to assess the entitlement by way of affidavits. In the judgment on assessment subject of appeal, the Deputy Registrar indicated that the Respondents had not filed any affidavit in opposition to the affidavit in support of assessment by the complainants, despite having been accorded the opportunity. The

record at page 227 shows that an affidavit in opposition was filed on the record dated 7<sup>th</sup> August 2014 which the learned Deputy Registrar did not take into account.

The Deputy Registrar awarded the Respondents the sums as tabulated in the affidavit of 19<sup>th</sup> April 2014 in the total sum of K449, 004, 076.91(unrebased).

Being dissatisfied with the judgment on assessment, the Appellant raised two grounds of appeal as follows;

- (i) The court below erred when it held that the appellants did not file any affidavit in opposition to the affidavit in support of assessment of damages and submission in oppositions.*
- (ii) The court below erred in arriving at the conclusion that the tabulations contained in the affidavit in support of summons for assessment filed by the Respondents on 19<sup>th</sup> April 2014, was in line with the awards of the court in its judgment of 9<sup>th</sup> October 2011.*

The Appellant submits that the evidence before the court below shows that on 7<sup>th</sup> August 2014, it filed into court, an affidavit in opposition to the application for assessment of outstanding balance on interest and judgment.

Further that, the court erred when it assessed the amount based on the tabulations contained in the affidavit in support of assessment of damages without evaluating the evidence, and

without taking into account the Appellant's affidavit in opposition on record. The parties having not been properly heard by the court below, it is only proper that the assessment of damages be heard *de novo*. Further that, the judgment on assessment be set aside and that parties go back to the Registrar for assessment.

At the hearing of the appeal the Respondents, conceded the fact that the court below did not take into account the affidavit in opposition filed by the appellant. Further that, the costs be borne by their previous advocates Messrs Chabu and Company who allegedly misled them that the judgment on assessment was good when in fact not.

We have considered the appeal, the proceedings in the court below, as well as the submissions by the parties.

The issue is simply whether the Deputy Registrar in the court below erred by not taking into account the affidavit in opposition filed by the Appellant.

It is not in issue that the Deputy Registrar did not take into account the affidavit in opposition dated 7<sup>th</sup> August 2014 filed by the Appellants. A perusal of the affidavit in opposition appearing at page 227 of the record shows that the Appellant disputed the

amounts tabulated by the Respondents, contending that the Respondents were paid all the leave dues as per payment requisition and acknowledged. Further that a lower sum was owed.

It is trite that matters should be decided on their substance and merit. Both sides must be heard. See the cases of **Tembo Vs. Sichembe & Others** <sup>(1)</sup> and **Mwambazi Vs. RDS Investments Limited** <sup>(2)</sup>. Had the Court below taken care to peruse or study the record, it would have discovered that the Appellant had filed an affidavit in opposition. A judgment not made on merits is liable to be set aside. We refer to the case of **RDS Investments Limited Vs. Moon Jelly Ouseph Joseph** <sup>(3)</sup> where the Supreme Court held that;

***“We have said before in a number of cases and wish to reiterate here that any judgment not on merits is liable to be set aside and on merits means both sides being heard.”***

We are of the view that the Deputy Registrar ought to have considered the opposing affidavit filed on record by the Appellants and taken it into account. A court is under a duty to hear both parties and to take into account the evidence by the parties. It is therefore, in the interest of justice and proper that the application for assessment of damages be heard *de novo* taking into account the affidavit in opposition on record.

We therefore set aside the judgment on assessment by the Deputy Registrar and order that the application for assessment of damages be heard de novo before another Deputy Registrar.

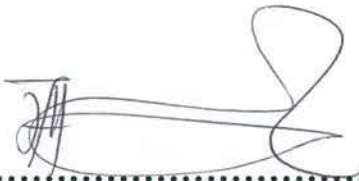
The costs are in the cause as we are of the view that the omission was by the court below not seeing the affidavit filed by the Appellant on record.

For the forgoing reasons, we find the appeal meritorious.



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F.M. Chishimba

**COURT OF APPEAL JUDGE**



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F.M. Lengalenga

**COURT OF APPEAL JUDGE**



.....  
M.J Siavwapa

**COURT OF APPEAL JUDGE**